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#### United Plasterers, LLC and Laurie Skinner.

# Dun-Rite Drywall and Finish Systems, Inc. and Susan Grievo. Cases 7–CA–50844 and 7–CA–50845

July 29, 2009

## SUPPLEMENTAL DECISION AND ORDER REMANDING

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

The General Counsel seeks a partial default judgment in this case on the ground that the Respondents have failed to file an adequate answer to certain allegations in the compliance specification.<sup>1</sup> For the reasons that follow, we grant the motion in part and deny it in part.

On October 31, 2008, the National Labor Relations Board issued a Decision and Order<sup>2</sup> finding that Respondent United Plasterers, LLC (United) violated Section 8(a)(3) and (1) of the Act by discharging Charging Party Laurie Skinner, and that Respondent Dun-Rite Drywall and Finish Systems, Inc. (Dun-Rite) violated Section 8(a)(3) and (1) by discharging Charging Party Susan Grievo. The Board ordered, inter alia, that the Respondents, respectively, make Skinner and Grievo whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. On March 20, 2009, the United States Court of Appeals for the Sixth Circuit entered a judgment enforcing the Board's Order.<sup>3</sup>

A controversy having arisen regarding the amounts of backpay due under the Order, the Regional Director for Region 7, on February 26, 2009, issued and served separately upon Respondent United and Respondent Dun-Rite, by certified mail, a compliance specification and notice of hearing, alleging the amounts due Skinner and Grievo, and informing the Respondents of their obligation to file an answer. Neither Respondent filed an answer.

On March 20, 2009, the Regional Director for Region 7 wrote and served separately upon Respondent United and Respondent Dun-Rite, by certified and regular mail, a letter advising them that they had not filed an answer,

timely or otherwise, to the compliance specification. The letter further advised the Respondents that unless they filed an answer by March 27, 2009, default judgment would be sought.

On March 27, 2009, the Respondents, by their attorney Heather Miserlian, filed a joint response to the compliance specification, generally denying the allegations in the specification. The response also asserted that, in any event, United would have laid off Skinner by February 25, 2008, and Dun-Rite would have laid off Grievo by July 1, 2008.

On March 31, 2009, the Regional Attorney for Region 7 sent a letter to Miserlian stating that the response was insufficient under Section 102.56(b) of the Board's Rules and Regulations because it failed to admit, deny, or explain each allegation of the compliance specification or provide alternate calculations. The letter further advised Miserlian that the General Counsel would file a motion for summary or default judgment if the Respondents did not file a legally sufficient answer by April 7, 2009. On April 8, 2009, the Respondents filed a first amended response to the compliance specification admitting some of the allegations, denying others, and stating that Respondents lacked sufficient information to form a belief with respect to those remaining.

On May 11, 2009, the General Counsel filed with the Board a Motion for Partial Default Judgment, asserting that the Respondents had failed to file sufficient answers to certain allegations of the compliance specification.<sup>4</sup> On May 13, 2009, the Board issued a Notice to Show Cause why the General Counsel's motion should not be granted.

On May 27, 2009, the Respondents filed an "Objection" to the General Counsel's motion, which we shall treat as a response to the Notice to Show Cause.

On the entire record, the Board makes the following

<sup>&</sup>lt;sup>1</sup> We shall treat the General Counsel's motion, which argues that the Respondents' answer is not legally sufficient under Sec. 102.56(b) of the Board's Rules and Regulations, as a motion for summary judgment. "Summary judgment is appropriate when a respondent does not raise a genuine issue of material fact." *Positive Electrical Enterprises*, 353 NLRB No. 27, slip op. at 2 fn. 7 (2008), quoting *Nick & Bob Partners*, 345 NLRB 1092, 1093 (2005).

<sup>&</sup>lt;sup>2</sup> 353 NLRB No. 44 (2008).

<sup>&</sup>lt;sup>3</sup> No. 09-1084 (unpublished).

<sup>&</sup>lt;sup>4</sup> The General Counsel does not seek default judgment with respect to the interim earnings and expenses of discriminatees Skinner and Grievo or the "effective dates of backpay" for either Skinner or Grievo.

Ruling on Motion for Partial Default Judgment<sup>5</sup>

In his motion, the General Counsel asserts that Respondent United's answers to paragraphs 4(a), 4(b), 4(c), 4(d), 5(c), 6(a), and 6(b) of the compliance specification, "except with respect to the effective dates of backpay," and Respondent Dun-Rite's answers to paragraphs 10(a), 10(b), 12(a), and 12(b), "except with respect to the effective dates of backpay," fail to comply with Section 102.56(b) of the Board's Rules and Regulations. In particular, the General Counsel asserts that the answers to the enumerated allegations, which concern the calculation of gross backpay, fail to provide appropriate detail or alternative calculations. Accordingly, the General Counsel moves that the foregoing allegations "be deemed to be admitted to be true," "except with respect to the effective dates of backpay."

In order to avoid default judgment, the answer to a compliance specification must be "sufficiently specific to raise a litigable issue of fact." *Aneco, Inc.*, 330 NLRB

<sup>5</sup> Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See Snell Island SNF LLC v. NLRB. 568 F.3d 410 (2d Cir. 2009); New Process Steel v. NLRB, 564 F.3d 840 (7th Cir. 2009), petition for cert. filed 77 U.S.L.W. 3670 (U.S. May 22, 2009) (No. 08-1457); Northeastern Land Services v. NLRB, 560 F.3d 36 (1st Cir. 2009), rehearing denied No. 08-1878 (May 20, 2009). But see Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB, 564 F.3d 469 (D.C. Cir. 2009), petitions for rehearing denied Nos. 08-1162, 08-1214 (July 1, 2009).

<sup>6</sup> Sec. 102.56(b) of the Board's Rules and Regulations states, in pertinent part:

(b) Contents of answer to specification.—The answer shall specifically admit, deny, or explain each and every allegation of the specification, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. Denials shall fairly meet the substance of the allegations of the specification at issue. When a respondent intends to deny only a part of an allegation, the respondent shall specify so much of it as is true and shall deny only the remainder. As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer shall specifically state the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the appropriate supporting figures.

If the respondent files an answer that does not satisfy the foregoing requirements with respect to any one or more of the allegations, Sec. 102.56(c) of the Rules provides that those allegations "shall be deemed to be admitted as true," and the respondent "shall be precluded from introducing any evidence" challenging them.

969, 971 (2000). With respect to the calculation of gross backpay in particular, Section 102.56(b) provides that if a respondent disputes the General Counsel's computation or the premises on which the computation is based, the respondent must "state the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the appropriate supporting figures." See *Eldeco, Inc.*, 336 NLRB 899, 900 (2001). In determining whether these requirements have been satisfied, we shall construe the pleadings "in the light most favorable to the nonmoving party," in this case, the Respondents. Id.

The Board has long held that "a respondent in a compliance proceeding may properly cure defects in its answer before a hearing by an amended answer or a response to a Notice to Show Cause." Consolidated Delivery & Logistics, Inc., 344 NLRB 544, 545 (2005), quoting Daufuskie Island Club & Resort, Inc., 341 NLRB 595, 596 (2004). Thus, in the present case, in determining whether the Respondents' denial of the allegations in the compliance specification is sufficient to avoid default or summary judgment, we shall consider together the Respondents' March 27, 2009 initial response, their April 8, 2009 first amended response, and their May 27, 2009 Objection to the General Counsel's motion.

### A. Respondent United (Charging Party Skinner)

Paragraph 4(a) of the compliance specification alleges that the appropriate measure of Skinner's gross backpay is the number of hours per week Skinner customarily worked when she was employed by United, multiplied by the number of weeks she was not employed after November 9, 2007, multiplied by her wage rate. Paragraph 4(b) alleges that Skinner worked an average 38.91 regular hours and 9.92 hours of overtime per week. Paragraphs 4(b) and (c) allege that Skinner's regular wage rate was \$20 per hour, but that she would have worked at a prevailing wage job in December 2007 and January 2008 at a rate of \$30.88 per hour.

In response, United asserts that (1) it "ceased operations on the job that the complainant was working on or about January 31, 2008" (Objection par. 7) and that Skinner would have been laid off at that time because that was "the ONLY job she was working on for United at the time the company was thrown off the job" (Objection par. 12(a)); (2) United "closed its doors for good" on September 30, 2008 (Objection par. 12(a) and (c)); (3) during the months of December 2007 and January 2008, Skinner "would only have worked approximately two (2)

<sup>&</sup>lt;sup>7</sup> Para. 3 of the specification alleges that Skinner's backpay period commences on November 9, 2007, and is ongoing for computational purposes through February 26, 2009.

weeks" and "would not have worked at all the other two weeks" (Objection par. 8); and (4) "the average workweek was forty (40) hours per week" (Objection par. 8).

Construing the pleadings in the light most favorable to United, we find that United sufficiently stated the basis for its disagreement with the specification's gross backpay formula and calculations, and provided an alternative formula, when it asserted that Skinner would have worked only 2 of the 4 weeks in December 2007 and January 2008, and that Skinner's hours should be based on an average work week of 40 hours rather than the number of hours set forth in the compliance specification.<sup>8</sup> Accordingly, we shall grant the General Counsel's motion for default judgment as to Skinner's applicable wage rates, including the prevailing wage rate, none of which United contests, and deny the motion as to the remaining gross backpay allegations pertaining to Skinner. We shall also direct a hearing to determine the effective dates of Skinner's backpay period, as well as Skinner's interim earnings and expenses, issues on which the General Counsel did not seek default judgment.

### B. Respondent Dun-Rite (Charging Party Grievo)

There are no contested default issues with respect to Dun-Rite and Grievo. In its pleadings, Dun-Rite concedes the accuracy of the compliance specification except for the allegation that Grievo's backpay continues to accrue. Dun-Rite asserts that, even in the absence of any unfair labor practices, it would have laid off Grievo on or before July 15, 2008 (Objection par. 9, 12; amended answer par. 12(b)). The General Counsel does not seek default judgment on that issue or with respect to Grievo's interim earnings and expenses. Thus, we shall grant the General Counsel's Motion for Partial Default Judgment

against Dun-Rite, and we shall direct a hearing to resolve the remaining issues, namely, the effective dates of Grievo's backpay and her interim earnings and expenses.

#### ORDER

IT IS ORDERED that the General Counsel's Motion for Partial Default Judgment is granted with respect to the allegations set forth in paragraph 4(b) and (c) of the compliance specification pertaining to the wage rate and prevailing wage rate of Charging Party Skinner, and Paragraph 10(a) and (b), pertaining to the method of calculating Charging Party Grievo's backpay, except with respect to the effective dates of Grievo's backpay period, and that those allegations are deemed to be true.

IT IS FURTHER ORDERED that the General Counsel's motion is denied in all other respects. A hearing is directed as to the effective dates of the backpay periods of Charging Parties Skinner and Grievo, the number of hours and weeks that Skinner would have worked for United after its unlawful termination of her, and the interim earnings and expenses of Skinner and Grievo.

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 7 for the purpose of issuing a notice of hearing and scheduling a hearing before an administrative law judge, which shall be limited to taking evidence concerning the paragraphs of the compliance specification as to which default judgment was not granted.

IT IS FURTHER ORDERED that the administrative law judge shall prepare and serve on the parties a supplemental decision containing findings of fact, conclusions of law, and recommendations based on all the record evidence. Following service of the administrative law judge's decision on the parties, the provisions of Section 102.46 of the Board's Rules shall be applicable.

Dated, Washington, D.C. July 29, 2009

Wilma B. Liebman,	Chairman
Peter C. Schaumber,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

<sup>&</sup>lt;sup>8</sup> Cf. Robincrest Landscaping & Construction, 303 NLRB 377, 378 (1991) (partial summary judgment granted because respondent, while contending that the discriminatee did not work 6 days per week as alleged in specification, "fail[ed] to offer an alternative formula for computing the backpay amount with appropriate alternative figures, including . . . an alternative number of days which would have been worked by the discriminatee involved"); Baumgardner Co., 298 NLRB 26, 27–28 (1990), enfd. 972 F.2d 1332 (3d Cir. 1992) (partial summary judgment granted where respondent disputed the number of hours the discriminatee would have worked, but did "not set forth alternatives with supporting figures"); Harding Glass Co., 337 NLRB 1116, 1117 (2002) (partial summary judgment granted where respondent denied the hours worked by the employees, but provided "neither an alternative formula nor alternative figures").